

DEFERRED ENTRY OF JUDGMENT/DIVERSION

[REVISED 2008]



**ADMINISTRATIVE OFFICE
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I. [§62.1] SCOPE OF BENCHGUIDE

This benchguide provides an overview of the deferred entry of judgment procedures for drug offenders and pretrial diversion proceedings. It includes a discussion of statewide diversion programs, including parental and child abuse and neglect diversion, and locally mandated misdemeanor diversion. Posttrial diversion programs, *i.e.*, education, treatment, or rehabilitation programs required of defendants as a condition of probation or as part of the sentence, are not addressed in this benchguide. Additionally, discussion of deferred entry of judgment for juvenile offenders ([Welf & I C §§790–795](#)) is beyond the scope of this benchguide.

II. PROCEDURE

A. [§62.2] Checklist: Ordering Probation Report; Setting Hearing

Cases should be referred to the probation department for a report, if at all possible, at the arraignment hearing. See [Pen C §1000\(b\)](#) (prosecutor should review file as soon as possible after filing of charges to allow court to set deferred entry of judgment hearing at arraignment). The practice in many counties is to require a referral to occur no later than the pretrial conference.

☛ **JUDICIAL TIP:** In routine cases involving first time drug offenders with clean criminal records, many judges, with the express or implied consent of the prosecutor, will summarily find a defendant suitable for deferred entry of judgment and summarily grant deferred entry of judgment without incurring the time and expense of a referral for a formal suitability evaluation. See [Pen C §1000.1\(b\)](#).

After the prosecutor has reviewed the case file, informed the defendant and defense counsel that the defendant is eligible to participate in a diversion or deferred entry of judgment program, and requested the

court to refer the case to the probation department, the judge must take the following steps:

(1) *Ask the defendant whether he or she consents to have the case referred to the probation department for an investigation and report.* [Pen C §§1000.1\(b\)](#) (drug deferred entry of judgment), [1001.52\(a\)](#) (misdemeanor diversion), [1001.72\(a\)](#) (parental diversion), [1001.22](#) (cognitive developmental disability diversion).

(2) *If the defendant does not consent, set a trial date (or preliminary hearing) within the statutory period under [Pen C §1382](#) (or [Pen C §859b](#)) unless defendant waives time.* [Pen C §§1000.1\(b\)](#), [1001.52\(a\)](#), [1001.72\(a\)](#), [1001.22](#).

(3) *If the defendant does consent:*

- *Advise the defendant of his or her right to a speedy trial and inform defendant that a waiver of that right is necessary for referral of the case to the probation department.*
- (Felony case) *Advise the defendant of his or her right to a preliminary hearing within 10 court days/60 calendar days. Inform the defendant that a waiver of that right is necessary for referral of the case to the probation department.* [Pen C §859b](#).
- *Ask the defendant whether he or she waives the right to speedy trial (and timely preliminary hearing). If no, set a trial date (or preliminary hearing) within the statutory period under [Pen C §1382](#) (or [Pen C §859b](#)). If yes, continue to step (4).* [Pen C §§1000.1\(b\)](#), [1001.52\(a\)](#), [1001.72\(a\)](#), [1001.22](#).

(4) *Order the case referred to the probation department for an investigation and report on the defendant's suitability for diversion or deferred entry of judgment.* [Pen C §§1000.1\(b\)](#), [1001.52\(a\)](#), [1001.72\(a\)](#), [1001.22](#).

(5) *Advise the defendant to cooperate with the probation department's investigation.* In addition, inform the defendant that his or her statements to the probation department may not be used against the defendant in any subsequent criminal action or proceeding. [Pen C §§1000.1\(c\)](#) (drug deferred entry of judgment), [1001.5](#), [1001.52\(b\)](#) (misdemeanor diversion), [1001.72\(b\)](#) (parental diversion), [1001.24](#) (cognitive developmental disability diversion).

(6) *Set a hearing date to determine whether to grant deferred entry of judgment or divert the defendant.* [Pen C §§1000.2](#) (drug deferred entry of judgment), [1001.53](#) (misdemeanor diversion), [1001.73](#) (parental diversion). But see [Pen C §1001.23\(a\)](#) (court may order diversion of defendant with a cognitive developmental disability without a hearing).

➡ **JUDICIAL TIP:** When setting the date for a diversion or deferred entry of judgment hearing, the judge should allow sufficient time

for the probation department to adequately conduct an investigation of the defendant. Courts generally set hearings four to six weeks after the referral to the probation department.

B. [§62.3] Checklist: Deferred Entry of Judgment Hearing

(1) *Call the case and ask for appearances.*

(2) *State for the record that the investigative report from the probation department was received, read, and considered. Also mention other relevant information considered by the court. Pen C §1000.2. But see Pen C §1000.1(b) (court may grant deferred entry of judgment without probation department report).*

(3) *Request and receive any comments from the defendant or defense counsel on the issue of deferred entry of judgment. Allow counsel to answer or rebut the contents of the probation report and/or other information considered by the court.*

(4) *Request and receive any comments from the prosecutor on the issue of deferred entry of judgment.*

(5) *Determine whether the defendant is a suitable candidate for deferred entry of judgment, i.e., whether defendant would benefit from the program of treatment, education, or rehabilitation mentioned in the probation report. Pen C §1000.2.*

(6) *If the judge finds the defendant unsuitable:*

- *State reason(s) for finding defendant unsuitable for deferred entry of judgment.*
- *Set a trial date (or preliminary hearing) within the statutory period under Pen C §1382 (or Pen C §859b) (to commence from this date) unless defendant waives time. Pen C §1000.2.*

(7) *If the judge finds the defendant suitable:*

- *State reason(s) for finding defendant suitable for deferred entry of judgment.*
- *Describe the program requirements to the defendant.*
- *Advise the defendant that he or she must plead guilty to the charge(s) and waive time for pronouncement of judgment before participating in the program. Pen C §1000.1(b).*
- *Advise the defendant that he or she will have to pay a restitution fee of not less than \$100 nor more than \$1000. Pen C §§1000.3, 1001.90. See §62.49 for discussion of restitution fees.*
- *Advise the defendant that he or she may have to pay all or a portion of the costs of the deferred entry of judgment program, and any reasonable costs incurred by the probation department for*

conducting a program investigation or filing progress reports with the court. Pen C §1000.3. See §§62.50–62.53 for discussion of program fees.

- ☛ JUDICIAL TIP: The probation department will determine the reasonable cost of probation services associated with the handling of the defendant's case. Pen C §§1000.3, 1203.1b. Payment of program costs is generally negotiated between the program and the defendant.
- *State the period of time the defendant will be required to participate in the deferred entry of judgment program. Pen C §1000.2 (18 months–three years).*
 - *Advise the defendant that a failure to enroll in the program or a failure to comply with or complete the program requirements may result in the entry of judgment against the defendant. Pen C §1000.3.*
 - *Advise the defendant that if he or she engages in criminal conduct during the program period, the court may enter judgment against the defendant. Pen C §1000.3.*
 - *Advise the defendant that if he or she successfully completes the program, the criminal charges will be dismissed and the arrest for the charge(s) deemed to have never occurred. Pen C §§1000.3, 1000.4(a).*
 - *Advise the defendant that if he or she is not a citizen, the guilty plea may result in deportation, exclusion from admission to the United States, or denial of naturalization, even if the defendant successfully completes the program. Pen C §1016.5. For discussion, see §62.18.*
- (8) *Ask the defendant if he or she consents to participate in the deferred entry of judgment program. Pen C §1000.2.*
- (9) *If the defendant does not consent, set a trial date (or preliminary hearing) within the statutory period under Pen C §1382 (or Pen C §859b) (to commence from this date) unless defendant waives time. Pen C §1000.2.*
- (10) *If the defendant consents:*
- *Advise the defendant of his or her right to a speedy trial and inform defendant that a waiver of that right is necessary before participating in the deferred entry of judgment program.*
 - *(Felony case) Advise the defendant of his or her right to a preliminary hearing within 10 court days/60 calendar days. Inform the defendant that a waiver of that right is necessary before*

participating in the deferred entry of judgment program. [Pen C §859b](#).

- *Ask the defendant if he or she waives the right to speedy trial (and timely preliminary hearing).* If no, set a trial date (or preliminary hearing) within the statutory period under [Pen C §1382](#) (or [Pen C §859b](#)) (to commence from this date). [Pen C §1000.2](#).

➡ JUDICIAL TIP: The judge should secure a time waiver even though the defendant has previously waived time at the referral hearing. This practice will preclude a challenge from defense counsel that the initial time waiver was effective only to the date of the deferred entry of judgment hearing.

- *Take the defendant's plea of guilty.* [Pen C §1000.1\(b\)](#). See California Judges Benchguide 52: *Misdemeanor Arraignment* (Cal CJER) and California Judges Benchguide 91: *Felony Arraignment and Pleas* (Cal CJER).
- *Advise the defendant of his or her right to a sentencing hearing and pronouncement of judgment within 6 hours to 5 days if misdemeanor case and within 20 judicial days if felony case.* [Pen C §§1191, 1449](#).
- *Ask the defendant if he or she waives time for pronouncement of judgment.* [Pen C §1000.1\(b\)](#).
- *Advise the defendant of his or her right to be sentenced by the judge who accepts the plea of guilty.* *People v Arbuckle* (1978) 22 C3d 749, 150 CR 778 (defendant has right to be sentenced by judge before whom the guilty plea is entered if judge maintains discretion to sentence under plea agreement).
- *Ask the defendant if he or she waives the right to be sentenced by that judge.*

(11) *Grant deferred entry of judgment.* [Pen C §§1000.1\(b\), 1000.2](#).

(12) *Order any bail bond, undertaking, or deposit on file by or on behalf of the defendant exonerated.* [Pen C §1000.2](#).

(13) (Optional) *Order the probation department to file with the court a report of defendant's compliance with the program at specified intervals.* [Pen C §1000.2](#).

(14) (Optional) *Set a progress report hearing date.*

C. [§62.4] Checklist: Diversion Hearing

(1) *Call the case and ask for appearances.*

(2) *State for the record that the investigative report from the probation department was received, read, and considered.* Also mention

other relevant information considered by the court. [Pen C §§1001.53](#) (misdemeanor diversion), [1001.73](#) (parental diversion), [1001.23\(b\)](#) (cognitive developmental disability diversion).

(3) *Request and receive any comments from the defendant or defense counsel on the issue of diversion.* Allow counsel to answer or rebut the contents of the probation report and/or other information considered by the court.

(4) *Request and receive any comments from the prosecutor on the issue of diversion.*

(5) *Determine whether the defendant is a suitable candidate for diversion, i.e., whether defendant would be benefited by the program of treatment, education, or rehabilitation mentioned in the probation report.* [Pen C §§1001.53, 1001.73, 1001.23\(b\)](#).

(6) *If the judge finds the defendant unsuitable:*

- *State reason(s) for finding defendant unsuitable for diversion.*
- *Set a trial date (or preliminary hearing) within the statutory period under [Pen C §1382](#) (or [Pen C §859b](#)) (to commence from this date) unless defendant waives time. [Pen C §§1001.53, 1001.73, 1001.23\(b\)](#).*

(7) *If the judge finds the defendant suitable:*

- *State reason(s) for finding defendant suitable for diversion.*
- *Describe the diversion program requirements to the defendant.*
- *Advise the defendant that he or she will have to pay a restitution fee of not less than \$100 nor more than \$1000. [Pen C §1001.90](#).*

Note: Defendants with cognitive developmental disabilities diverted under [Pen C §§1001.20–1001.34](#) are not subject to a restitution fee. See [§62.49](#) for discussion of restitution fees.

- *Advise the defendant that he or she may have to pay all or a portion of the costs of the diversion program. [Pen C §§1001.53](#) (misdemeanor diversion: payment of reasonable cost of diversion discretionary), [1001.73](#) (parental diversion: payment of reasonable cost of diversion discretionary). See [§§62.50–62.53](#) for discussion of program fees.*

☛ **JUDICIAL TIP:** The probation department in many counties will determine the defendant's ability to pay administrative fees and recommend a fee amount as part of its diversion investigation and report. Payment of program costs is generally negotiated between the program and the defendant.

- *State the period of time the defendant will be required to participate in the diversion program. [Pen C §§1001.53](#) (mis-*

demeanor diversion: maximum two years), 1001.73 (parental diversion: maximum two years), 1001.28 (cognitive developmental disability diversion: maximum two years).

- *Advise the defendant that a failure to enroll in the diversion program or a failure to comply with or complete the program requirements may result in the termination of diversion and the resumption of the criminal proceedings against the defendant. Pen C §§1001.54 (misdemeanor diversion), 1001.74 (parental diversion), 1001.29 (cognitive developmental disability diversion).*
- *Advise the defendant that if he or she engages in criminal conduct during the diversion period, the court may terminate diversion and resume the criminal proceedings. Pen C §§1001.54, 1001.74, 1001.29.*
- *Advise the defendant that if he or she successfully completes the program, the criminal charges will be dismissed and the arrest for the charge(s) deemed to have never occurred. Pen C §§1000.3, 1000.4(a).*

(8) *Ask the defendant if he or she consents to participate in the diversion program. Pen C §§1001.53, 1001.73, 1001.23(b).*

(9) *If the defendant does not consent, set a trial date (or preliminary hearing) within the statutory period under Pen C §1382 (or Pen C §859b) (to commence from this date) unless defendant waives time. Pen C §§1001.53, 1001.73, 1001.23(b).*

(10) *If the defendant consents:*

- *Advise the defendant of his or her right to a speedy trial and inform defendant that a waiver of that right is necessary before participating in the diversion program.*
- *(Felony case) Advise the defendant of his or her right to a preliminary hearing within 10 court days/60 calendar days. Inform the defendant that a waiver of that right is necessary before participating in the diversion program. Pen C §859b.*
- *Ask the defendant if he or she waives the right to speedy trial (and timely preliminary hearing). If no, set a trial date (or preliminary hearing) within the statutory period under Pen C §1382 (or Pen C §859b) (to commence from this date). If yes, continue to step (11). Pen C §§1001.53, 1001.73, 1001.23(b).*

➤ **JUDICIAL TIP:** The judge should secure a time waiver even though the defendant has previously waived time at the diversion referral hearing. This practice will preclude a challenge from defense counsel that the initial time waiver was effective only to the date of the diversion hearing.

(11) *Order the criminal proceedings diverted.* Pen C §§1001.53, 1001.73, 1001.23(b).

(12) *Order any bail bond, undertaking, or deposit on file by or on behalf of the defendant exonerated.* Pen C §§1001.6, 1001.53 (misdemeanor diversion), 1001.73 (parental diversion), 1001.27 (cognitive developmental disability diversion).

(13) (Optional) *Order the probation department to file with the court a report of defendant's compliance with the program at specified intervals.* See Pen C §1001.23(c) (cognitive developmental disability diversion: probation department or regional center must submit progress report not less than every six months).

(14) (Optional) *Set a progress report hearing date.*

III. APPLICABLE LAW

A. [§62.5] Overview

Diversion is the procedure of suspending the criminal prosecution of an individual, either temporarily or permanently, by substituting the individual's participation in education, treatment, or rehabilitation programs instead of further criminal proceedings. Diversion has become a very popular method of alleviating congested court calendars, while at the same time sparing qualified first-offenders the stigma of a criminal record by substituting community education and counseling programs.

Some of the diversion programs discussed in this benchguide are “true” diversion programs. These programs provide for the suspension of criminal proceedings after the filing of an accusatory pleading with the eventual dismissal of the charges following a defendant's successful completion of the program. “True” diversion programs include parental (*i.e.*, contributing to delinquency of minor), and cognitive developmental disability diversion. The judge ultimately decides whether a person is to be allowed to participate in a “true” diversion program. Misdemeanor diversion falls in this category, but unlike the other programs that are mandated statewide by statute, misdemeanor diversion operates only where locally mandated.

On the other hand, bad check diversion and nonsexual child abuse and neglect counseling are two diversion programs that fall into another category, sometimes called “DA diversion.” These programs authorize the prosecutor, in his or her sole discretion, to determine which individuals will be diverted. The court plays no role in approving individuals for or supervising participation in these programs. No criminal charges are filed against individuals selected for these programs. Rather, the individual is entitled to enforce the prosecutor's promise of nonprosecution on successful completion of the program.

Diversion is no longer available to defendants charged with drug offenses. Rather, those defendants may be subject to a deferred entry of judgment program. Unlike the former drug diversion program, the deferred entry of judgment program requires the defendant to plead guilty to the drug charge(s), with the entry of judgment deferred while the defendant participates in a drug treatment program. If the defendant successfully completes the program, the court must dismiss the charge. If the defendant fails to complete the program or is later found unsuitable for the program, the court may grant a motion for entry of judgment, render a finding of guilty to the charge(s) pleaded, enter judgment, and schedule a sentencing hearing.

B. Deferred Entry of Judgment for Drug Offenders

1. [§62.6] Qualifying Drug Offenses

A defendant who is otherwise eligible (see §62.7) may be considered for deferred entry of judgment if charged for a violation or attempted violation of one of the following offenses (*Pen C §1000(a)*; *People v Barrajas* (1998) 62 CA4th 926, 73 CR2d 123 (defendant who attempts to commit qualifying offense eligible under former drug diversion scheme)):

- *Health & S C §11350*—possession of designated controlled substances formerly classified as narcotics.
- *Health & S C §11357*—possession of concentrated cannabis or marijuana.

Note: *Health & S C §11357(b)* provides for a separate diversion scheme for offenses involving small amounts of marijuana. See §62.21.

- *Health & S C §11358*—cultivation of marijuana, if the marijuana cultivated is for personal use.
- *Health & S C §11364*—possession of drug paraphernalia.
- *Health & S C §11365*—presence in room or place where designated controlled substances are being used, with knowledge of and while aiding, assisting, or abetting the use of the controlled substances.
- *Health & S C §11368*—generation and use of forged or altered prescription to obtain a narcotic drug, if the narcotic drug secured by the fictitious prescription is for personal use and was not sold or furnished to another.
- *Health & S C §11377*—possession of designated controlled substances formerly classified as restricted dangerous drugs.

- [Health & S C §11550](#)—use or under the influence of designated controlled substances except when administered by or under the direction of a person licensed to dispense, prescribe, or administer controlled substances ([Health & S C §11550\(a\)](#)); under the influence of cocaine, cocaine base, heroin, or methamphetamine while in the immediate personal possession of a loaded, operable firearm ([Health & S C §11550\(e\)](#)).

Note: Deferred entry of judgment is *not* available to defendants charged with both being under the influence of phencyclidine or designated analogs of phencyclidine, *and* with either battery of a peace officer or other designated persons engaged in the performance of their duties ([Pen C §243\(b\) or \(c\)](#)) *or* being under the influence while in the immediate personal possession of a loaded, operable firearm ([Health & S C §11550\(e\)](#)). [Health & S C §11550\(g\)](#).

- [Pen C §381](#)—under the influence of toluene or similar substance.
- [Pen C §647\(f\)](#)—under the influence of a controlled substance in a public place.
- [Pen C §653f\(d\)](#)—solicitation of another person to commit designated controlled substance offenses, if the solicitation was for acts directed to personal use only.
- [Veh C §23222\(b\)](#)—possession of one ounce or less of marijuana while driving a motor vehicle.
- [Bus & P C §4060](#)—possession of controlled substance without prescription.

2. [§62.7] Conditions of Eligibility

After it is determined that the defendant is charged with a qualifying offense, all the following conditions must be met before the defendant is considered eligible for deferred entry of judgment:

- *The defendant has no conviction for any offense involving controlled substances before the alleged commission of the charged offense.* [Pen C §1000\(a\)\(1\)](#). (Exception: If the charged offense is possession of one ounce or less of marijuana, the defendant may be eligible for diversion even if the defendant has had prior convictions of the same offense. [Health & S C §11357\(b\)](#); see [§62.21](#).) A guilty plea or guilty verdict, on which sentence has not been imposed, is sufficient to establish a conviction for a prior controlled substance offense *People v Kirk* (2006) 141 CA4th 715, 719–724, 46 CR3d 258.
- *The charged offense did not involve a crime of violence or threatened violence.* [Pen C §1000\(a\)\(2\)](#). An offense does not involve a crime of violence or threatened violence unless the drug offense played some part in the commission of the violent offense, *e.g.*, defendant was under the influence at the time of the violent offense. Mere possession during the commission of a crime does not render the defendant ineligible for deferred entry of judgment. *People v Macafee* (1980) 109 CA3d 808, 812, 167 CR 495. See also *Harvey v Superior Court* (1974) 43 CA3d 66, 69, 117 CR 383 (possession of marijuana charge did not involve burglary when the marijuana was found during booking for burglary that had occurred 24 hours earlier).
- *There is no evidence of a violation relating to narcotics or other restricted dangerous drugs other than a violation or attempted violation of an offense listed in [Pen C §1000\(a\)](#).* [Pen C §1000\(a\)\(3\)](#); *People v Barrajas* (1998) 62 CA4th 926, 73 CR2d 123. See *People v Duncan* (1990) 216 CA3d 1621, 265 CR 612 (defendant charged with being under the influence of a controlled substance under [Health & S C §11550](#) and driving under the combined influence of alcohol and a controlled substance under [Veh C §23152\(a\)](#), after blood test showed presence of cocaine, not eligible for diversion under former [Pen C §1000\(a\)\(3\)](#)). The type of evidence required under [Pen C §1000\(a\)\(3\)](#) is information showing that the defendant has “probably committed” a disqualifying narcotics offense, not simply a suspicion or rumor to that effect. *Sledge v Superior Court* (1974) 11 C3d 70, 75, 113 CR 28. There is no requirement that the defendant actually be charged with the disqualifying offense. *People v Covarrubias* (1993) 18 CA4th 639, 642, 22 CR2d 475. See also *People v Flores* (1987) 196 CA3d 475, 486, 241 CR 835 (evidence of prior narcotics charge dismissed due to reasons irrelevant to the current charge and the diversion proceeding properly considered by the prosecutor); and *People v Sturiale* (2000) 82 CA4th 1308, 1315,

98 CR2d 865 (evidence of charge of transportation of methamphetamine dismissed as part of plea bargain properly considered).

- *The defendant's record does not indicate that probation or parole has been revoked without later being completed.* Pen C §1000(a)(4). “Probation,” as used in this section, includes both formal probation and conditional sentence, also referred to as court or summary probation. *People v Bishop* (1992) 11 CA4th 1125, 15 CR2d 539. Penal Code §1000(a)(4) requires a satisfactory and successful completion of probation conditions. *People v Martinsen* (1987) 193 CA3d 843, 238 CR 530 (defendant not eligible for diversion when probation for two prior offenses was summarily revoked at time of arrest on current offense).
- *The defendant's record does not indicate that he or she has successfully completed or been terminated from diversion or deferred entry of judgment under Chapter 2.5 (Pen C §§1000–1000.5) within five years before the alleged commission of the charged offense.* Pen C §1000(a)(5); *People v Burns* (1997) 53 CA4th 1171, 62 CR2d 211.
- *The defendant has no prior felony conviction within five years before the alleged commission of the charged offense.* Pen C §1000(a)(6). See *People v Marsh* (1982) 132 CA3d 809, 813, 183 CR 455 (defendant whose prior felony offense was reduced to a misdemeanor *after* the commission of the divertible offense not eligible for diversion under former Pen C §1000). There is no case law addressing the effect of a reduction of a prior felony conviction to a misdemeanor during the five-year time period.

3. [§62.8] Eligibility of Defendant With Prior “Strikes”

The three-strikes law (Pen C §§667(b)–(i), 1170.12) does not preclude an otherwise eligible defendant from participating in a deferred entry of judgment program because of the existence of prior “strikes” convictions. *People v Davis* (2000) 79 CA4th 251, 93 CR2d 905. The three-strikes law requires a state prison commitment when a defendant with prior “strikes” convictions is convicted of a felony. Pen C §§667(c)(4), 1170.12(a)(4). A plea of guilty by a defendant in a deferred entry of judgment, however, does not constitute a conviction unless the defendant fails the program and a judgment of guilty is entered under Pen C §1000.3. Pen C §1000.1(d); *People v Davis, supra*, 79 CA4th at 257 (court also stated the deferred entry of judgment program is not functionally equivalent to diversion and therefore the diversion prohibition contained in the three-strikes law is irrelevant).

- ☛ **JUDICIAL TIP:** When granting deferred entry of judgment to a defendant with prior strikes, the court should require the defendant not only to enter a plea of guilty to the charges but to also admit the prior strikes. The potential of a three-strikes sentence should encourage the defendant to successfully complete the program and underscores the severe consequences of noncompliance.

4. [§62.9] Eligibility of Illegal Alien

Illegal aliens are not categorically precluded from participating in the deferred entry of judgment program. The trial court may consider illegal alien status as a factor in determining whether the defendant is a suitable candidate for the program, but illegal alien status is not an automatic disqualification. *People v Cisneros* (2000) 84 CA4th 352, 357, 100 CR2d 784. Although an illegal alien may be a poor candidate for the program given typically limited community ties and the prospect of deportation, a misdemeanor violation of immigration laws does not necessarily constitute criminal conduct rendering him or her unsuitable for deferral. 84 CA4th at 358.

5. [§62.10] Determination of Eligibility by Prosecutor

When a defendant is charged with a qualifying offense, the prosecutor must review the defendant's case file to determine whether the defendant meets the eligibility requirements outlined in [Pen C §1000\(a\)\(1\)–\(6\)](#). [Pen C §1000\(b\)](#). A review of the defendant's file will necessarily include the consideration of hearsay evidence, including reports from criminal investigators, arresting officers, victims, and witnesses. *Sledge v Superior Court* (1974) 11 C3d 70, 113 CR 28. In determining whether there is evidence of a disqualifying narcotics violation under [Pen C §1000\(a\)\(3\)](#), the prosecutor must make the finding on evidence amounting to more than mere suspicion or rumor. *Sledge v Superior Court, supra*. The prosecutor should conduct a review of the case file as soon as possible so that the judge will be able to set a hearing for deferred entry of judgment at the defendant's arraignment. [Pen C §1000\(b\)](#).

Case law is unclear as to whether the prosecutor may base a determination of defendant's eligibility on evidence suppressed under [Pen C §1538.5](#). Compare *People v Dyas* (1979) 100 CA3d 464, 161 CR 39 (no), with *People v Flores* (1987) 196 CA3d 475, 486, 241 CR 835 (passage of [Proposition 8](#) may have nullified holding in *Dyas*).

After determining the defendant's eligibility or ineligibility for deferred entry of judgment, the prosecutor must file with the court a

written declaration or state orally for the record the grounds on which the determination is based, and make this information available to the defendant and defense counsel. [Pen C §1000\(b\)](#). If the defendant is found eligible, the prosecutor must notify the defendant and defense counsel of the following in writing:

(1) A full description of the procedures for deferred entry of judgment. [Pen C §1000.1\(a\)\(1\)](#).

(2) A general explanation of the roles and authorities of the probation department, the prosecutor, the community program, and the court in the process. [Pen C §1000.1\(a\)\(2\)](#).

(3) A clear statement that (a) the court may, instead of trial, grant deferred entry of judgment if the defendant pleads guilty to the offense(s) charged and waives time for pronouncement of judgment, and (b) on the defendant's successful completion of a drug treatment program, and on the positive recommendation of the program authority, and the motion of the prosecutor, the court, or the probation department, the court must dismiss the charge(s) no sooner than 18 months and no later than three years from the date of the defendant's referral to the program. [Pen C §1000.1\(a\)\(3\)](#).

(4) A clear statement that if the defendant fails to meet the terms of the program or any circumstance specified in [Pen C §1000.3](#), the prosecutor or the probation department or the court on its own may make a motion to the court for entry of judgment and the court must render a finding of guilt to the charge(s) pleaded, enter judgment, and schedule a sentencing hearing. [Pen C §1000.1\(a\)\(4\)](#).

(5) An explanation of criminal record retention and disposition resulting from participation in the deferred entry of judgment program and the defendant's rights relative to answering questions about his or her arrest and deferred entry of judgment following successful completion of the program. [Pen C §1000.1\(a\)\(5\)](#).

6. [§62.11] Referral to Probation Department

If the defendant consents to deferred entry of judgment and waives the right to a speedy trial or a speedy preliminary hearing, the judge may refer the case to the probation department or summarily grant deferred entry of judgment if the defendant pleads guilty to the charge(s) and waives time for pronouncement of judgment. [Pen C §1000.1\(b\)](#). When the case is referred to the probation department, the department must investigate and consider the following factors in determining whether the defendant would be benefited by education, treatment, or rehabilitation ([Pen C §1000.1\(b\)](#)):

- Defendant's age
- Employment and military service records

- Educational background
- Community and family ties
- Prior controlled substance use
- Any history of treatment
- Demonstrable motivation
- Other mitigating factors

In addition to determining whether the defendant would be benefited by education, treatment, or rehabilitation, the probation department must determine which programs would benefit the defendant and which would accept the defendant. [Pen C §1000.1\(b\)](#).

To encourage the defendant's cooperation with the probation department investigation, [Pen C §1000.1\(c\)](#) provides that defendant's statements to a probation officer or drug treatment worker, or any information obtained from those statements, are not admissible in any action or proceeding, including a sentencing hearing. In addition, the defendant's statements with respect to the charged offense made after a grant of deferred entry of judgment, or any information procured from those statements, are inadmissible. [Pen C §1000.1\(c\)](#).

The department must report its findings and recommendations to the court, which must make the final determination of whether the defendant should be diverted. [Pen C §1000.1\(b\)](#).

7. [§62.12] Hearing and Determination by Court

When a defendant is found eligible for deferred entry of judgment by the prosecutor, the court must hold a hearing, before commencement of trial, to determine whether the defendant should be granted deferred entry of judgment. [Pen C §1000.2](#); *Morse v Municipal Court* (1974) 13 C3d 149, 157, 118 CR 14. The judge may grant deferred entry of judgment if, after reviewing any relevant information, including the probation department report, the judge finds that the defendant would benefit by the program, and the defendant consents to participate. [Pen C §1000.2](#). A defendant's plea of guilty under the deferred entry of judgment program will not constitute a conviction for any purpose unless a judgment of guilt is ultimately entered under [Pen C §1000.3](#). [Pen C §1000.1\(d\)](#). But see §62.18 (consequences of plea under immigration law).

The defendant may be granted deferred entry of judgment and referred to an education, treatment, or rehabilitation program for a period not less than 18 months nor more than three years. [Pen C §1000.2](#). The judge may require the probation department to monitor the defendant's compliance with the program and file progress reports with the court. [Pen C §1000.2](#).

When a defendant is granted deferred entry of judgment, the case does not automatically terminate after the passage of the three-year limit for participation. The court retains jurisdiction over the case, even beyond three years, if no action has been taken to terminate the program and enter judgment on the defendant's failure to complete the program (see §62.17) or to dismiss the charges on successful completion (see §62.16). *People v Popular* (2006) 146 CA4th 479, 483–486, 52 CR3d 708 (defendant spent a large portion of the three-year period either failing to appear in court or asking for continuances on the mandated hearings; to dismiss charges merely because three years have passed would lead to “absurd” results).

When deferred entry of judgment is granted, any bail bond, undertaking, or deposit on file by or on behalf of the defendant is exonerated, and the judge must enter an order to that effect. Pen C §1000.2. The judge may deny deferred entry of judgment only if he or she finds that the defendant is not suitable for or would not benefit from the program, or if the defendant does not consent to participate. Pen C §§1000(b), 1000.2. Denial on any other ground is an abuse of the court's discretion. *Harvey v Superior Court* (1974) 43 CA3d 66, 68, 117 CR 383 (abuse of discretion to deny diversion on belief that defendant was a deliberate narcotics violator); *Scott v Municipal Court* (1974) 11 C3d 799, 800, 114 CR 600 (abuse of discretion to deny diversion solely because prosecutor objected).

If the judge does not grant deferred entry of judgment, the criminal proceedings will continue as in any other case, and the judge must set a trial date within the statutory period required under Pen C §1382, commencing on the date deferred entry of judgment is denied, unless the defendant consents to a longer period. Pen C §1000.2; *People v Denman* (1983) 145 CA3d Supp 40, 49, 193 CR 863 (interpreting similar language in former domestic violence statutes, court held that new speedy trial period begins to run after diversion denied). In determining whether the new statutory period should be 30 days (in-custody cases) or 45 days (all other cases) in misdemeanor cases, the custody status of the defendant at the time of arraignment or plea, and not his or her custody status on the date diversion is denied, is controlling. *People v Denman, supra*; Pen C §1382(a).

8. [§62.13] Pretrial Review of Prosecutor's Determination

If the prosecutor determines that the defendant is not eligible for deferred entry of judgment, the defendant's sole remedy is a post-conviction appeal. Pen C §1000(b); *People v Wright* (2002) 99 CA4th 201, 205–208, 121 CR2d 419 (trial court erred in granting deferral over prosecution's objection); *People v Sturiale* (2000) 82 CA4th 1308, 1314, 98 CR2d 865.

Under the former drug diversion program, a defendant was not entitled to pretrial judicial review of a prosecutor's adverse diversion eligibility determination. *Sledge v Superior Court* (1974) 11 C3d 70, 75, 113 CR 28. The courts of appeal recognized an exception under the former diversion program when the prosecutor's eligibility determination involves resolution of factual issues or statutory interpretation, both judicial functions. *People v Williamson* (1982) 137 CA3d 419, 422, 187 CR 107; *People v Paz* (1990) 217 CA3d 1209, 1217, 266 CR 468. However, the courts of appeal are in disagreement as to which eligibility determinations involve those judicial functions, particularly regarding whether the determination that there is evidence that a defendant possessed narcotics for sale rendering defendant ineligible under Pen C §1000(a)(3) is a judicial function. The courts in *Williamson* and *People v Venghiattis* (1986) 185 CA3d 326, 333, 229 CR 636, held that determining whether a defendant possesses marijuana (in violation of Health & S C §11358) for personal or commercial use involves issues of credibility and the resolution of conflicting inferences of intended use, and therefore is a function of the trial court. But the courts in *People v Brackett* (1994) 25 CA4th 488, 500, 30 CR2d 557, and *People v McAlister* (1990) 225 CA3d 941, 944, 275 CR 229, held that a prosecutor's determination that there is evidence of a violation that defendant possessed narcotics for sale does not involve the resolution of conflicting inferences or the determination of credibility, and therefore is not subject to pretrial review.

As to the issue of whether an eligibility determination involves statutory interpretation, two cases provide guidance. In *People v Paz*, *supra*, the court held that a determination that the defendant had a prior conviction for an offense involving controlled substances is not subject to review as the finding did not involve statutory interpretation or fact-finding. In *People v Martinsen* (1987) 193 CA3d 843, 848, 238 CR 530, the court held that the determination of whether the defendant has successfully completed probation within the meaning of Pen C §1000(a)(4) does involve statutory interpretation requiring a hearing and court examination of defendant's record.

9. [§62.14] Qualifying Programs

When the judge grants deferred entry of judgment, he or she must refer the defendant to one of the following programs:

- Programs certified by the county drug program administrator under Pen C §1211.

- Programs that provide services at no cost to the defendant and have been deemed by the court and the county drug program administrator to be credible and effective. [Pen C §1000\(c\)](#).

The defendant may request to be referred to a program in any county, as long as that program meets the criteria above. [Pen C §1000\(c\)](#).

As part of a treatment and supervision program, the defendant may be required to undergo urine analysis to test for the presence of drugs. However, the test results are not admissible as evidence in any subsequent criminal prosecution or proceeding. [Pen C §1000\(e\)](#).

The defendant may also participate in a licensed methadone or levoalphacetylmethadol (LAAM) program if the county operates such a program in the county jail and other conditions are met. [Pen C §1000.8](#).

10. [§62.15] Participation in AIDS Education Program

When a defendant is charged with a violation of [Health & S C §11350\(a\)](#), [§11377\(a\)](#), or [§11550](#), or [Pen C §647\(f\)](#), and the offense involves intravenous use of a controlled substance, the court must require the defendant, as a condition of deferred entry of judgment, to participate in an AIDS education program or in a drug treatment program that includes an AIDS prevention education component. [Pen C §§1001.10, 1001.11\(c\)](#). Testing for AIDS must be offered to the defendant, but is not required. [Pen C §1001.10](#).

11. [§62.16] Successful Completion of Deferred Entry of Judgment Program

When the defendant has successfully completed all terms and conditions of the deferred entry of judgment program, (a) the criminal charges must be dismissed, (b) the arrest on which the judgment was deferred is deemed never to have occurred, and (c) the defendant is entitled to state that he or she was not arrested or granted deferred entry of judgment for the offense in response to any questions concerning defendant's prior criminal record. [Pen C §§1000.3, 1000.4\(a\)](#). However, a defendant who applies for employment as a peace officer must disclose the arrest in response to a question contained in the job application. [Pen C §1000.4\(b\)](#). In addition, the defendant must be advised that the arrest may be disclosed by the Department of Justice in response to a peace officer job application. [Pen C §1000.4\(b\)](#). If the defendant is not a U.S. citizen, he or she may be subject to immigration consequences, notwithstanding successful completion of the program. See [§62.18](#).

Before dismissing the charge(s), the court must consider the defendant's ability to pay and determine whether the defendant has paid

an ordered [Pen C §1001.90](#) restitution fee and has met any financial obligation to the program. [Pen C §1000.3](#). See §§[62.49–62.50](#), and [62.53](#). The defendant must also reimburse the probation department for the reasonable cost of any program investigation or progress reports filed with the court. [Pen C §1000.3](#).

The record pertaining to an arrest resulting in successful completion of a deferred entry of judgment program may not be used in any way that could result in the denial of any employment, benefit, license, or certificate, unless the defendant consents to its use. [Pen C §1000.4\(a\)](#). The protection of [Pen C §1000.4\(a\)](#) extends not only to applicants for licenses, but also to disciplinary proceedings against licensees. *B.W. v Board of Med. Quality Assur.* (1985) 169 CA3d 219, 215 CR 130. But see [Pen C §1000\(d\)](#) (successful completion of deferred entry of judgment program for violation of [Health & S C §11368](#) does not prohibit administrative agency from taking disciplinary action against a licensee or from denying a license). See also [Bus & P C §492](#) (completion of diversion program does not prohibit administrative agency from taking disciplinary action against licensee or from denying license for professional misconduct, notwithstanding that evidence of misconduct may be contained in the arrest record).

12. [§62.17] Entry of Judgment Proceedings

The probation department, the prosecutor, or the court on its own may make a motion for entry of judgment on the following grounds:

- It appears to the probation department, the prosecutor, or the court that the defendant is not performing satisfactorily in or benefiting from the assigned education, treatment, or rehabilitation program;
- The defendant is convicted of a misdemeanor that reflects the defendant's propensity for violence;
- The defendant is convicted of a felony; or
- The defendant has engaged in any other criminal conduct rendering him or her unsuitable for deferred entry of judgment. [Pen C §1000.3](#).

Before the court may enter judgment, the defendant must be given notice and the court must hold a hearing to determine whether the judgment should be entered. [Pen C §1000.3](#); *In re Scoggins* (2001) 94 CA4th 650, 657, 114 CR2d 508 ([Pen C §1000.3](#) requires formal noticed motion to enter judgment). If the court finds that the defendant is not performing satisfactorily in or benefiting from the program or has engaged in criminal activities described above, the court must render a finding of

guilt to the charge(s) pleaded, enter judgment, and schedule a sentencing hearing. [Pen C §1000.3](#).

Before rendering a finding of guilt and entering judgment, the court must consider the defendant's ability to pay and determine whether the defendant has paid an ordered [Pen C §1001.90](#) restitution fee and has met any financial obligation to the program. [Pen C §1000.3](#). See §§[62.49–62.50](#), [62.53](#). The defendant must also reimburse the probation department for the reasonable cost of any program investigation or progress reports filed with the court. [Pen C §1000.3](#).

13. [§62.18] Immigration Consequences of Program Participation

Participation in the deferred entry of judgment program may subject a noncitizen defendant to the adverse immigration consequences specified in [Pen §1016.5](#) (deportation, exclusion from admission to the United States, denial of naturalization) even if the defendant completes the program and the charges are dismissed under [Pen C §1000.3](#).

Although [Pen C §1001.1\(d\)](#) states that the plea of guilty required for participation in the program does not constitute a conviction for any purpose unless a judgment of guilt is entered, the federal definition of conviction does not require a formal adjudication of guilt and is controlling for purposes of administering federal law. *U.S. v Cuevas* (1st Cir 1996) 75 F3d 778, 780–783. Under federal law, an alien defendant is deemed convicted if he or she pleads guilty or no contest or admits facts sufficient to support a finding of guilt, and the judge orders imposition of some form of punishment, penalty, or restraint on the defendant's liberty. 8 USC §1101(a)(48)(A). Imposition of the terms of a grant of deferred entry of judgment is likely to be considered a form of punishment, penalty, or restraint on the defendant's liberty. See *People v Perez* (1998) 68 CA4th 346, 355, 80 CR2d 188 (deferred entry of judgment similar in effect and purpose to probation; deemed an alternative form of punishment even though one purpose is to rehabilitate).

The U.S. Ninth Circuit Court of Appeals has held that first time drug offenders convicted of simple possessions offenses who successfully complete a deferred entry of judgment program are not subject to immigration consequences. *Lujan-Armendariz v INS* (9th Cir 2000) 222 F3d 728. The court stated that this narrow class of defendants who could have been subject to the Federal First Offender Act (FFOA) (18 USC §3607) but who are instead prosecuted under state law and whose offenses are expunged under a state rehabilitative law do not stand "convicted" under federal law. See also *Cardenas-Uriarte v INS* (9th Cir 2000) 227 F3d 1132, 1136–1138 (defendant whose conviction for possession of drug paraphernalia was expunged under state law may be eligible for first

offender treatment); *Ramirez-Castro v INS* (9th Cir 2002) 287 F3d 1172, 1174–1176 (court refused to expand protection from deportation to defendant whose expunged conviction was not within scope of FFOA and continued to qualify as a conviction for some purposes under California law).

14. [§62.19] Relation to Proposition 36

Defendants who participate in a deferred entry of judgment program may be eligible for probation and drug treatment under [Proposition 36](#) ([Pen C §§1210–1210.1](#)) when their participation in the program is terminated and the previously deferred judgment is entered under [Pen C §1000.3](#). *In re Scoggins* (2001) 94 CA4th 650, 657–658, 114 CR2d 508 (“conviction” triggering [Proposition 36](#) postsentencing scheme means adjudication of guilt and sentencing); *84 Ops Cal Atty Gen 85* (2001) (passage of [Proposition 36](#) did not repeal deferred entry of judgment program; both have concurrent operation). Eligibility requirements are set out in [Pen C §1210.1\(a\)–\(b\)](#). See 3 Witkin & Epstein, *California Criminal Law, Crimes Against Public Peace and Welfare*, Supp §§126A–126C (3rd ed 2000) for discussion of Proposition 36 procedures.

When a defendant charged with a drug offense is first placed in a deferred entry of judgment program and then fails to enroll in and attend drug treatment, the defendant thereafter may be found ineligible for drug treatment probation under [Proposition 36](#) as having refused drug treatment as a condition of probation under [Pen C §1210.1\(b\)\(4\)](#). *People v Strong* (2006) 138 CA4th Supp 1, 4–6, 41 CR3d 867.

15. [§62.20] Preguilty Plea Drug Court Program

The presiding judge of the superior court, or a judge designated by the presiding judge, together with the district attorney and the public defender, may agree in writing to establish and conduct a preguilty plea drug court program. [Pen C §1000.5\(a\)](#). Under such a program, the criminal proceedings are suspended without a plea of guilty for designated defendants. [Pen C §1000.5\(a\)](#).

The drug court program must provide for sanctions and rewards, individual and group therapy, urine analysis testing commensurate with treatment needs, close court monitoring and supervision, educational or vocational counseling as appropriate, and other requirements as agreed to by the presiding judge, the district attorney, and the public defender. [Pen C §1000.5\(a\)](#).

The provisions of [Pen C §§1000.3 and 1000.4](#) regarding successful and unsuccessful performance in a program apply to preguilty plea programs. [Pen C §1000.5\(b\)](#).

A defendant participating in a preguilty plea program may also participate in a licensed methadone or levoalphacetylmethadol (LAAM) program if the county operates such a program in the county jail and other conditions are met. [Pen C §1000.8](#).

16. [§62.21] Marijuana Diversion

A defendant *convicted* of possession of one ounce or less of marijuana, other than concentrated cannabis, and who has three or more prior convictions of the same offense within two years of the commission of the present offense (which are found or admitted to be true), is subject to a separate mandatory diversion scheme under [Health & S C §11357\(b\)](#). Under that statute, the defendant is subject to [Pen C §§1000.1 and 1000.2](#), and *must* be diverted and referred by the court to an education, treatment, or rehabilitation program that accepts him or her. Procedures that apply in other diversion proceedings do not apply to cases of mandatory marijuana diversion. The referral must be made without a court hearing, and without either the concurrence of, or an eligibility determination by, the prosecutor. [Health & S C §11357\(b\)](#); [Pen C §1000\(a\)](#). [Health and Safety Code §11357\(b\)](#) does not provide for dismissal of the charge after completion of the mandatory postconviction diversion. It states only that the defendant be subject to diversion under [Pen C §§1000.1 and 1000.2](#), and fails to mention [Pen C §1000.3](#).

The courts of appeal disagree as to whether the language in [Pen C §1000\(a\)](#) excepting the provisions of [Health & S C §11357\(b\)](#) from the prosecutor's eligibility determination precludes the availability of diversion to [Health & S C §11357\(b\)](#) offenders with fewer than three prior convictions. Compare *People v Paz* (1990) 217 CA3d 1209, 1216, 266 CR 468 (yes), with *People v Squier* (1993) 15 CA4th 235, 242, 18 CR2d 536 (no; defendant may choose diversion or payment of fine).

C. [§62.22] General Misdemeanor Diversion

Counties may establish local pretrial diversion programs for defendants charged with misdemeanors. Two sets of statutes, [Chapter 2.7 of the Penal Code](#) ([Pen C §§1001–1001.9](#)) and [Chapter 2.9 of the Penal Code](#) ([Pen C §§1001.50–1001.55](#)) provide for misdemeanor diversion. Both contain similar procedural provisions, but the later enacted Chapter 2.9 is more specific as to its procedures and provides criteria for acceptability into a program. Chapter 2.9 also states that it “shall apply whenever a case is before any court upon an accusatory pleading concerning the commission of a misdemeanor.” Chapter 2.9 thus appears to supersede Chapter 2.7, and to the extent that the programs are in conflict, the provisions of Chapter 2.9 should prevail. However, because

Chapter 2.9 requires enabling ordinances from the county (Pen C §1001.50(a)), any Chapter 2.7 program operating in a county which has not enacted enabling ordinances appears to be authorized.

Although the two chapters differ in some respects, a number of the provisions of the two diversion schemes are identical. Both diversion programs are conditioned on the approval of the prosecutor. Pen C §§1001.2(b), 1001.50(b); *Davis v Municipal Court* (1988) 46 C3d 64, 73, 249 CR 300 (prosecutor's power to approve or disapprove local diversion program is permissible delegation of legislative authority). However, the judge, and not the prosecutor, determines whether a defendant will be diverted. Pen C §§1001.2(b), 1001.50(b). The judge may exercise his or her discretion to divert alleged misdemeanants only if a Chapter 2.7 or Chapter 2.9 diversion program has been established in the county. Pen C §1001.50; *People v Padfield* (1982) 136 CA3d 218, 230, 185 CR 903 (Chapter 2.7 not a general grant of authority to courts to grant diversion outside a program mandated by the state or local government).

Pretrial diversion is defined under both chapters as the procedure of postponing prosecution of an offense filed as a misdemeanor either temporarily or permanently at any point in the judicial process from the point at which the defendant is charged until adjudication. Pen C §§1001.1, 1001.50(c), 1001.51.

1. [§62.23] Conditions of Eligibility

Counties set their own eligibility guidelines for misdemeanor diversion programs, subject to some statutory restrictions. Defendants charged with drunk driving under Veh C §23152 or §23153 or any drug offense governed by the deferred entry of judgment statutes (Pen C §§1000–1000.5) are not eligible for Chapter 2.7 or Chapter 2.9 misdemeanor diversion. Pen C §§1001.2(a), 1001.51(b). In addition, a defendant may not be diverted under Chapter 2.9 who is charged with any of the following:

- An offense for which a special diversion program is otherwise separately established under the Penal Code (*e.g.*, bad check diversion). Pen C §1001.51(b).
- An offense for which incarceration would be mandatory on conviction. Pen C §1001.51(c)(1).
- An offense for which Pen C §290 sex offender registration would be required on conviction. Pen C §1001.51(c)(2).
- An offense reduced from a felony to a misdemeanor by the court under Pen C §17(b)(5). Pen C §1001.51(c)(3).

- An offense involving the use of force or violence against a person, except a violation of [Pen C §241](#) (assault on peace officer) or [Pen C §243](#) (battery). [Pen C §1001.51\(c\)\(4\)](#).
- An offense for which probation may not be granted. [Pen C §1001.51\(c\)\(5\)](#).
- A driving offense punishable as a misdemeanor under the Vehicle Code. [Pen C §1001.51\(c\)\(6\)](#).

A defendant who is not charged with any of the above disqualifying misdemeanor offenses must meet the following conditions in order to be considered for Chapter 2.9 diversion:

- The defendant's record does not indicate that probation or parole has been revoked without later being completed. [Pen C §1001.51\(a\)\(1\)](#).
- The defendant has not been diverted under Chapter 2.9 within five years before the filing of the accusatory pleading that charges the divertible offense. [Pen C §1001.51\(a\)\(2\)](#).
- The defendant has never been convicted of a felony. [Pen C §1001.51\(a\)\(3\)](#).
- The defendant has no prior misdemeanor conviction within five years before filing of the accusatory pleading. [Pen C §1001.51\(a\)\(3\)](#).

2. [§62.24] Chapter 2.7 Procedure

The Chapter 2.7 diversion program provides few specific procedural guidelines. These guidelines include the following:

- The defendant is entitled to notice and a hearing before diversion may be terminated for cause. [Pen C §1001.4](#); *Kramer v Municipal Court* (1975) 49 CA3d 418, 122 CR 672.
- The court must exonerate any bail, undertaking, or deposit on file by, or on behalf of defendant, when diversion is granted. [Pen C §1001.6](#).
- The defendant is not required to admit guilt as a prerequisite for placement in a diversion program. [Pen C §1001.3](#).
- On defendant's successful completion of diversion, the criminal charges are dismissed and the arrest on which the diversion is based is deemed to have never occurred. [Pen C §§1001.7, 1001.9\(a\)](#). See [§62.28](#).
- Defendant's statements made in connection with the defendant's eligibility for diversion, or any information obtained from those

statements, are not admissible in any subsequent action or proceeding. [Pen C §1001.5](#).

Chapter 2.7 does not require, as does Chapter 2.9, referral by the probation department, or a hearing, before the court determines whether to grant or deny diversion.

3. Chapter 2.9 Procedure

a. [§62.25] Referral to Probation Department

If the defendant consents to diversion and waives the right to a speedy trial, the judge must refer the case to the probation department. [Pen C §1001.52\(a\)](#). The probation department must conduct an investigation to determine whether the defendant is eligible for diversion under [Pen C §1001.51\(a\)](#) and whether the defendant would benefit from education, treatment, or rehabilitation. [Pen C §1001.52\(a\)](#). The department must report its findings and recommendation to the court. If the department recommends that the defendant be referred to a community program, the report must contain a statement regarding the program's willingness to accept the defendant and the manner in which the program can assist the defendant in successfully completing the program. [Pen C §1001.52\(a\)](#).

The defendant's statements to any probation officer made in connection with the defendant's eligibility for diversion, or any information obtained from those statements, are not admissible in any subsequent action or proceeding. [Pen C §1001.52\(b\)](#).

b. [§62.26] Hearing and Determination by Court

The court must hold a hearing to determine whether the defendant would benefit from diversion. [Pen C §1001.53](#). The judge may order diversion if, after reviewing the probation department's report and other relevant information, the judge finds that the defendant would benefit, and the defendant consents to participate in the program and waives the right to speedy trial. [Pen C §1001.53](#). The defendant may be diverted for a period of not more than two years. [Pen C §1001.53](#).

If diversion is ordered, the judge may inquire into the defendant's financial condition, and if the judge finds that the defendant has the ability to pay, may order the defendant to pay for all or a portion of the reasonable cost of diversion. [Pen C §1001.53](#). The reasonable cost of diversion may not exceed the actual average cost of diversion services. [Pen C §1001.53](#). In addition to paying the costs of the program, the defendant may be required to pay an administrative fee under [Pen C §1001.16](#). See §§62.50–62.53.

If the judge finds the defendant unsuitable for participation in a diversion program, or the defendant does not consent to participate, the criminal proceedings must continue as in any other case. [Pen C §1001.53](#). For discussion of the statutory period within which the judge must set a trial date, see [§62.12](#).

When diversion is granted, the judge must enter an order directing the exoneration of any bail bond, undertaking, or deposit on file by or on behalf of the defendant. [Pen C §1001.53](#).

c. [§62.27] Termination of Diversion

The court may terminate misdemeanor diversion and reinstitute criminal proceedings on the following grounds:

- It appears to the probation department that the defendant is not performing satisfactorily in or benefiting from the assigned diversion program;
- The defendant is convicted of a misdemeanor involving the use of force or violence; or
- The defendant is convicted of a felony. [Pen C §1001.54](#).

The defendant must be given notice and the court must hold a hearing to determine whether the criminal proceedings should be resumed. [Pen C §1001.54](#); *Kramer v Municipal Court* (1975) 49 CA3d 418, 424, 122 CR 672.

d. [§62.28] Successful Completion of Diversion (Chapters 2.7 and 2.9)

When the defendant has successfully completed all terms and conditions of misdemeanor diversion, (1) the criminal charges must be dismissed, (2) the arrest on which the diversion was based is deemed to have never occurred, and (3) the defendant is entitled to state that he or she was not arrested or diverted for the offense in response to any questions concerning defendant's prior criminal record. [Pen C §§1001.7, 1001.9\(a\), 1001.54, 1001.55\(a\)](#). However, a defendant who applies for employment as a peace officer must disclose the arrest in response to any question contained in the job application. [Pen C §§1001.9\(b\), 1001.55\(b\)](#). In addition, the defendant must be advised that the arrest may be disclosed by the Department of Justice in response to any peace officer job application. [Pen C §§1001.9\(b\), 1001.55\(b\)](#).

The record pertaining to an arrest resulting in successful completion of diversion may not be used in any way that could result in the denial of any employment, benefit, license, or certificate, unless the defendant consents to its use. [Pen C §§1001.9\(a\), 1001.55\(a\)](#).

D. [§62.29] Diversion for Contributing to Delinquency of Minor (Parental Diversion)

The local prosecutor who has jurisdiction to prosecute violations of [Pen C §272\(a\)](#) (contributing to delinquency of minor) has the power to approve a diversion program for a parent or legal guardian who has contributed to the delinquency of his or her minor child. [Pen C §§1001.70, 1001.71](#). However, the prosecutor does not have the authority to determine whether a particular defendant will be diverted. [Pen C §1001.70](#). As with the other “true” diversion programs (*e.g.*, cognitive developmental disability program), it is the judge, not the prosecutor, who determines whether to grant diversion.

1. [§62.30] Conditions of Eligibility

When an accusatory pleading charges that a parent or legal guardian has violated [Pen C §272\(a\)](#) with respect to his or her minor child, the defendant may be eligible for parental diversion if the following conditions are met:

- The defendant’s record does not indicate that probation or parole has been revoked without later being completed. [Pen C §1001.71\(a\)](#).
- The defendant has not been previously diverted under [Chapter 2.9](#) ([Pen C §§1001.70–1001.75](#)). [Pen C §1001.71\(b\)](#).

Unlike other diversion programs, the provisions governing parental diversion do not require the prosecutor to review the file to determine whether the defendant is eligible for diversion. It can be implied from this omission that it is the responsibility of the defendant, not the prosecutor, to initiate a diversion request.

2. [§62.31] Referral to Probation Department

If the defendant consents to diversion and waives the right to a speedy trial, the judge must refer the case to the probation department. [Pen C §1001.72\(a\)](#). The probation department must investigate whether the defendant qualifies for parental diversion and whether the defendant would benefit from education, treatment, or rehabilitation, and must report its findings and recommendations to the court. [Pen C §1001.72\(a\)](#). If the report recommends referral of the defendant to a community program, it must contain a statement regarding the program’s willingness to accept the defendant and the manner in which the services offered can assist the defendant in the successful completion of the program. [Pen C §1001.72\(a\)](#).

The defendant's statements to a probation officer made during the course of the department's investigation, or any information obtained from those statements, may not be admitted into evidence in any later action or proceeding. [Pen C §1001.72\(b\)](#). In addition, the defendant's statements with respect to the charged offense made after a grant of diversion, or any information procured from those statements, are inadmissible. [Pen C §1001.72\(b\)](#). If diversion is denied or revoked, neither the probation department investigation nor statements or information disclosed during the investigation may be used in any sentencing procedures. [Pen C §1001.72\(b\)](#).

3. [§62.32] Hearing and Determination by Court

The court must hold a hearing, before the start of trial, to determine whether the defendant should be diverted and referred for education, treatment, or rehabilitation. [Pen C §1001.73](#); *Morse v Municipal Court* (1974) 13 C3d 149, 157, 118 CR 14. The judge may order diversion, if after reviewing the probation department's report and any other relevant information, the judge finds that the defendant would be benefited by diversion, and the defendant consents to participate and waives the right to a speedy trial. [Pen C §1001.73](#).

The judge may order a defendant who is to participate in a diversion program to pay all or a portion of the reasonable cost of diversion if the judge finds the defendant has the ability to pay. [Pen C §1001.73](#). The reasonable cost of diversion may not exceed the actual average cost of diversion services. [Pen C §1001.73](#). In addition to paying the costs of the program, the defendant may be required to pay an administrative fee under [Pen C §1001.16](#). See §§62.50–62.53.

When the judge grants diversion, he or she must enter an order directing the exoneration of any bail bond, undertaking, or deposit on file by or on behalf of the defendant. [Pen C §1001.73](#). The defendant may be diverted for a period of not more than two years. [Pen C §1001.73](#).

If the defendant does not consent to diversion, or the judge finds the defendant unsuitable for participation, the criminal proceedings must continue as in any other case. [Pen C §1001.73](#). For discussion of the statutory period within which the judge must set a trial date, see §62.12.

4. [§62.33] Successful Completion of Diversion

If the defendant has successfully completed a parental diversion program, (a) the criminal charges must be dismissed, (b) the arrest on which the diversion was based is deemed to have never occurred, and (c) the defendant is entitled to state that he or she was never arrested or diverted for the offense in response to any questions concerning

defendant's prior criminal record. [Pen C §§1001.74, 1001.75\(a\)](#). However, a defendant who applies for employment as a peace officer must disclose the arrest in response to any question contained in the job application. [Pen C §1001.75\(b\)](#). In addition, the defendant must be advised that the arrest may be disclosed by the Department of Justice in response to any peace officer job application. [Pen C §1001.75\(b\)](#).

The record pertaining to an arrest resulting in successful completion of diversion may not be used in any way that could result in the denial of any employment, benefit, license, or certificate, unless the defendant consents to its use. [Pen C §1001.75\(a\)](#).

5. [§62.34] Termination of Diversion

The court may terminate diversion and reinstitute criminal proceedings on the following grounds:

- It appears to the probation department that the defendant is not performing satisfactorily in or benefiting from the assigned diversion program;
- The defendant is convicted of a misdemeanor involving the use of force or violence; or
- The defendant is convicted of a felony. [Pen C §1001.74](#).

Before the court may terminate diversion, the defendant must be given notice and the court must hold a hearing to determine whether the criminal proceedings should be reinstituted. [Pen C §1001.74](#); *Kramer v Municipal Court* (1975) 49 CA3d 418, 424, 122 CR 672.

E. [§62.35] Diversion of Defendants With Cognitive Developmental Disabilities

The court may divert a defendant who is charged with a misdemeanor offense and is determined by a regional center for the developmentally disabled to be a person with a cognitive developmental disability. [Pen C §1001.21](#). Such a defendant may be diverted when his or her case is before the court on an accusatory pleading at any stage of the criminal proceedings. [Pen C §1001.21\(a\)](#). However, defendants with cognitive developmental disabilities who are charged with drunk driving offenses or who have been diverted under this program within two years of the current charge are ineligible for diversion. [Pen C §1001.21\(b\)](#); [Veh C §23640](#); *People v Weatherill* (1989) 215 CA3d 1569, 264 CR 298. A defendant who is autistic or has a disabling condition closely related to mental retardation or autism (see below) may be diverted only if he or she was a client of a regional center for the developmentally disabled at the time of the charged offense. [Pen C §1001.21\(c\)](#).

A cognitive developmental disability is defined as any of the following ([Pen C §1001.20\(a\)\(1\)–\(3\)](#)):

- Mental retardation—a condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.
- Autism—a diagnosed condition of markedly abnormal or impaired development in social interaction, in communication, or in both, with a markedly restricted repertoire of activity and interests.
- Disabling conditions found to be closely related to mental retardation or autism, or that require treatment similar to that required for individuals with mental retardation or autism, and that would qualify an individual for services provided under the [Lanterman Developmental Disabilities Services Act \(Welf & I C §§4500 et seq\)](#).

1. [§62.36] Diversion Evaluations

When the judge suspects that a defendant has a cognitive developmental disability, as defined in [Pen C §1001.20\(a\)](#), and the defendant consents to have his or her case evaluated for diversion eligibility and waives the right to a speedy trial, the judge must initiate a diversion investigation by the prosecutor, the probation department, and the regional center for the developmentally disabled. [Pen C §1001.22](#) (first paragraph). Specifically, the judge must order the prosecutor and the two agencies to prepare separate evaluation reports addressing specific aspects of the defendant's case. [Pen C §1001.22](#) (first paragraph). If the defendant is not represented by counsel, the judge must appoint counsel to the defendant's case. [Pen C §1001.22](#) (first paragraph).

Statements made by the defendant to the probation department, regional center, or prosecutor during the course of their investigations, or any information obtained from those statements, may not be admitted into evidence in any subsequent action or proceeding. [Pen C §1001.24](#). In addition, the defendant's statements about the charged offense made subsequent to a grant of diversion, or any information procured from those statements, are inadmissible. [Pen C §1001.25](#). If diversion is denied or revoked, neither the probation department investigation nor statements or information disclosed during the investigations by the probation department and regional center may be used in any sentencing procedures. [Pen C §1001.26](#).

- ➡ JUDICIAL TIP: Because of the complex, time-consuming, and expensive formal procedures required for diversion of defendants

with cognitive developmental disabilities, in relatively minor cases the judge may want to attempt to persuade the parties to use a more informal and streamlined procedure to affect the same result, *e.g.*, offering a dismissal in the furtherance of justice under [Pen C §1385\(a\)](#) on proof of good behavior, payment of restitution, successful treatment, and/or timely performance of community service.

a. [§62.37] Regional Center’s Report

The regional center must submit a report to the probation department within 25 judicial days of the court order. [Pen C §1001.22\(a\)](#). This report must include the following:

- A determination of whether the defendant has a cognitive developmental disability and is eligible for regional center diversion-related treatment and habilitation services.
- A proposed diversion program tailored to the needs of the defendant, which must include treatment addressed to the charged criminal offense.
- Whether the proposed program is available through the treatment and habilitation services of the regional center. [Pen C §1001.22\(a\)](#).

b. [§62.38] Prosecutor’s Report

The prosecutor must send a report to the court, the defendant, and each of the other agencies involved in the case within 30 judicial days. [Pen C §1001.22\(b\)](#). This report must include the following:

- Whether the defendant’s record indicates that the defendant has been diverted under [Chapter 2.8 \(Pen C §§1001.20–1001.34\)](#) within two years before the alleged commission of the charged divertible offense.
- If the prosecutor recommends diversion, whether the prosecutor recommends a diversion program administered jointly by the regional center and the probation department (dual agency diversion) or a program administered solely by the regional center (single agency diversion). This recommendation must be provided in writing to the court, the defendant, and the two agencies within 20 judicial days of the court’s order to prepare the report.
- If the prosecutor does not recommend diversion, a written declaration stating the grounds for the recommendation.
- If dual agency diversion is recommended:

- A full description of the diversion proceedings and the prosecutor’s investigation procedures.
- A general explanation of the role and authority of the court, the prosecutor, the probation department, and the regional center in the diversion program process.
- A clear statement that the court may decide in a hearing not to divert the defendant and that the defendant may have to stand trial for the charged divertible offense.
- A clear statement that if the defendant fails in meeting the diversion terms, or is charged with a felony during the diversion period, he or she may be required, after a hearing, to stand trial for the charged divertible offense. [Pen C §1001.22\(b\)](#).

c. [§62.39] Probation Department’s Report

The probation department must submit a report within 30 judicial days of the court’s order, to the court, the defendant, and each of the other agencies involved in the case. [Pen C §1001.22\(c\)](#). The department must conduct an investigation and take into consideration the following factors in determining whether the defendant would benefit from a treatment and habilitation program ([Pen C §1001.22\(c\)](#)):

- Defendant’s age,
- Cognitive developmental disability,
- Employment record,
- Educational background,
- Community and family ties,
- Treatment history,
- Any history of criminal activity,
- Demonstrable motivation, and
- Other mitigating factors

The regional center’s report (see [§62.37](#)) must be attached to the probation department’s report to the court. [Pen C §1001.22\(c\)](#).

2. [§62.40] Court Determination of Eligibility

If a defendant has a cognitive developmental disability and is eligible for regional center services, the judge must review the evaluation reports from the regional center, probation department, and prosecutor to determine if the proposed diversion program is acceptable to them. [Pen C](#)

§1001.23(a). If the program is acceptable and the defendant consents to participation and waives the right to speedy trial, the judge may order implementation of the diversion program without a hearing. [Pen C §1001.23\(a\)](#). The judge must then determine whether the defendant should be diverted under single or dual agency (regional center and probation department) supervision. [Pen C §1001.23\(b\)](#). The judge may order the defendant to participate in a diversion program for up to two years. [Pen C §1001.28](#). Any bail, bond, undertaking, or deposit instead of bail filed on behalf of the defendant must be exonerated at the time diversion is ordered. [Pen C §1001.27](#).

If the regional center determines that the defendant does not have a cognitive developmental disability, the judge must reinstitute the suspended criminal proceedings. [Pen C §1001.23\(a\)](#). If the defendant is eligible for diversion but the judge finds that the defendant would not benefit from diversion, the judge may reinstitute the criminal proceedings, order diversion at a later date, or make any other disposition authorized by law. [Pen C §1001.23\(b\)](#).

3. [§62.41] Monitoring by Regional Center and Probation Department

When dual agency diversion is ordered by the court, both the regional center and the probation department are responsible for administering the diversion program and monitoring the defendant's progress. [Pen C §§1001.20\(f\), 1001.23\(c\), 1001.28](#). The regional center must provide a report on the defendant's progress in the program to the probation department not less than every six months. [Pen C §§1001.23\(c\), 1001.28](#). On receiving the regional center report, the probation department must submit, within five judicial days, its own progress report to the court and the prosecutor. [Pen C §1001.23\(c\)](#). A copy of the regional center's assessment must be attached to the probation department report. [Pen C §§1001.23\(c\), 1001.28\(a\)](#).

If single agency diversion is ordered, the regional center is solely responsible for administering the diversion program and monitoring the defendant's progress. [Pen C §§1001.20\(g\), 1001.23\(c\), 1001.28\(b\)](#). The regional center must submit a report on the defendant's progress in a single agency diversion program directly to the court and the prosecutor not less than every six months. [Pen C §§1001.23\(c\), 1001.28](#).

4. [§62.42] Modification or Termination of Diversion Program

If it appears to the court that the defendant is not meeting the terms and conditions of the diversion program, the court may hold a hearing to

modify the program to require greater supervision by the regional center and/or the probation department. [Pen C §1001.29](#). The court may also conduct a hearing to determine whether to terminate diversion and reinstitute the suspended criminal proceedings if the defendant's performance in the program is unsatisfactory or if the defendant is charged with the commission of a felony during the period of diversion. [Pen C §1001.29](#).

A hearing to reinstitute the criminal proceedings may be initiated by the court, the prosecutor, or the regional center. [Pen C §1001.29\(a\)–\(b\)](#). In dual agency diversion cases, the probation department may also initiate the hearing. [Pen C §1001.29\(a\)](#). Notice of any hearing to modify or terminate diversion must be provided to the defendant by the court or the agency moving for such action. [Pen C §1001.29\(c\)](#).

When the cause of the hearing to reinstitute criminal proceedings is a subsequent felony charge against the defendant, the hearing must be delayed until probable cause has been established on the felony charge and the defendant is bound over for trial. [Pen C §1001.29\(d\)](#).

The defendant may withdraw consent to participate in the diversion program at any time. [Pen C §1001.30](#). On withdrawal of consent, the court may reinstitute the criminal proceedings or make any other disposition authorized by law. [Pen C §1001.30](#).

5. [§62.43] Successful Completion of Diversion

If the defendant has successfully completed the diversion program, (a) the criminal charges must be dismissed, (b) the arrest on which the diversion was based is deemed to have never occurred, and (c) the defendant is entitled to state that he or she was never arrested or diverted for the offense in response to any questions concerning defendant's prior criminal record. [Pen C §§1001.31, 1001.33\(a\)](#). However, a defendant who applies for employment as a peace officer must disclose the arrest in response to any question contained in the job application. [Pen C §1001.33\(b\)](#). In addition, the defendant must be advised that the arrest may be disclosed by the Department of Justice in response to any peace officer job application. [Pen C §1001.33\(b\)](#).

The record pertaining to an arrest resulting in successful completion of diversion may not be used in any way that could result in the denial of any employment, benefit, license, or certificate, unless the defendant consents to its use. [Pen C §1001.33\(a\)](#).

F. [§62.44] Child Abuse and Neglect Counseling

A defendant who is suspected of committing a crime in which a minor is a victim of physical abuse or neglect may be referred by the

prosecuting attorney for counseling, psychological treatment, or other necessary services instead of prosecution. [Pen C §1000.12\(b\)](#). If the prosecuting attorney decides that the defendant should be referred, the defendant is directed to the county department in charge of social services or the probation department. [Pen C §1000.12\(b\)](#). The prosecuting attorney must seek the advice of the county department or probation department in determining whether or not to make the referral. [Pen C §1000.12\(b\)](#); *People v Glover* (1980) 111 CA3d 914, 917, 169 CR 12 (interpreting former identical statutory scheme as requiring county review only if prosecutor initially decides to refer defendant).

Unlike true diversion programs, criminal charges are not filed by the prosecuting attorney, and no court supervision is involved. The decision to refer a defendant lies completely with the prosecuting attorney, and the court may not interfere with that decision.

Defendants charged with sexual abuse or molestation of a minor victim, or any sexual offense involving force, violence, duress, menace, or fear of immediate and unlawful bodily injury, are not eligible for counseling under [Pen C §1000.12](#). [Pen C §1000.12\(c\)](#).

G. [§62.45] Bad Check Diversion

On the adoption of a county resolution declaring the availability of program funding, the district attorney may establish a local diversion program for persons who write bad checks. [Pen C §1001.60](#). The program may be conducted by the district attorney or by a private entity under contract with the district attorney. [Pen C §1001.60](#). For purposes of this program, writing a bad check means making, drawing, uttering, or delivering any check or draft when there is probable cause to believe there has been a violation of [Pen C §476a](#). [Pen C §1001.60](#).

1. [§62.46] Referral by Prosecutor

The prosecutor, not the judge, decides whether or not to divert a defendant in a bad check case. [Pen C §1001.61](#). On receipt of a bad check case, the prosecutor must determine if the case is appropriate for referral to diversion by considering all the following factors, in addition to any others:

- The amount of the bad check;
- Whether the defendant has a prior criminal record or has previously been diverted;
- The number of bad check grievances against the defendant previously received by the district attorney;

- Whether there are bad check grievances currently pending against the defendant; and
- The strength of the evidence, if any, of intent to defraud the victim. [Pen C §1001.62](#).

The prosecutor must notify the defendant by mail of the diversion referral, stating the date and amount of the bad check, the name of the payee, the date before which the defendant must contact the person designated by the prosecutor concerning the bad check, and the penalty for writing a bad check. [Pen C §1001.63](#).

2. [§62.47] Agreement To Forgo Prosecution

The prosecutor may enter into a written agreement with the defendant to forgo prosecution for a period not to exceed six months, pending the following conditions:

- That the defendant completes a class or classes conducted by the district attorney or private entity under contract with the district attorney.
- That the defendant makes full restitution to the victim of the bad check.
- That the defendant makes full payment of a collection fee, if any, specified in [Pen C §1001.65](#). [Pen C §1001.64](#). Under [Pen C §1001.65](#), the district attorney may collect a processing fee of \$35 per check in addition to the actual amount of any bank charges incurred by the victim.

As with other diversion programs, the defendant is not required to make an admission of guilt as a condition of participation in the diversion program. [Pen C §1001.66](#). In addition, any statements of the defendant made in connection with his or her eligibility for diversion, information obtained from those statements, or any statements or information concerning the defendant's participation in a diversion program may not be admitted into evidence in any action or proceeding. [Pen C §1001.67](#).

H. [§62.48] Traffic Diversion

Provisions of both the Vehicle Code and the Penal Code provide for the pretrial diversion of alleged traffic violators in the form of attendance at traffic school. [Penal Code §1001.40](#) provides that, notwithstanding any other provision of law, counties may establish traffic school diversion programs for persons issued notices to appear for a traffic violation. [Vehicle Code §41501](#) states that a court may continue a proceeding against a person who receives a notice to appear for a violation of any

statute relating to the safe operation of a vehicle in consideration for attendance at a licensed traffic school or any other court-approved driving instruction program. If the court continues a case under [Veh C §41501](#) and the defendant attends the required hours of instruction, the court may dismiss the complaint. Finally, [Veh C §42005\(b\)](#) provides that a court, instead of adjudicating a traffic offense, may order a person issued a notice to appear for a traffic violation to attend traffic school if the person consents to attend the school.

The record of a first traffic violation dismissed on completion of traffic school within an 18-month period is confidential, and may not be disclosed to any person except the court. [Veh C §1808.7](#). Therefore, the record cannot be disclosed to or used by the defendant's insurance company to increase defendant's policy rates. In addition, [Veh C §1808.7](#) provides that the DMV may use the record only for statistical purposes, thereby preventing the DMV from suspending, or otherwise restricting, the defendant's driving privileges. However, the confidentiality protection of [Veh C §1808.7](#) extends only to the record of the first dismissal within an 18-month period. Subsequent offenses charged within that period may be disclosed even if the defendant attends traffic school again and obtains dismissal of the offenses.

Persons who are ordered or permitted to attend traffic school must pay a fee to the court equal to the total bail set forth for the eligible offense in the uniform countywide bail schedule. [Veh C §42007](#).

None of the traffic diversion statutes addresses the issue of whether traffic school is available only to those persons charged with infractions, or to those persons also charged with misdemeanors and/or felonies. However, persons charged with driving under the influence under [Veh C §23152](#) or [§23153](#) are ineligible for diversion. [Veh C §23640](#); *People v Weatherill* (1989) 215 CA3d 1569, 1577, 264 CR 298.

I. [§62.49] Restitution Fee

All defendants participating in a diversion or deferred entry of judgment program, except defendants with cognitive developmental disabilities diverted under [Pen C §§1001.20–1001.34](#), must pay a restitution fee of between \$100 and \$1000. [Pen C §1001.90\(a\)–\(b\), \(i\)](#). The fee is set at the discretion of the court, and must be ordered regardless of the defendant's present ability to pay. [Pen C §1001.90\(b\)–\(c\)](#).

The court must consider a number of factors when setting the fee in excess of the \$100 minimum ([Pen C §1001.90\(d\)](#)):

- Defendant's ability to pay, including future earning capacity;
- Seriousness and gravity of the offense, and the circumstances of its commission;

- Economic gain derived by the defendant as a result of the offense;
- Losses suffered by the victim(s) of the offense, including pecuniary losses as well as intangible losses, *e.g.*, psychological harm; and
- Any other relevant factors.

The court is not required to make express finding as to the factors bearing on the amount of the fee. [Pen C §1001.90\(d\)](#).

The defendant bears the burden of demonstrating the lack of his or her ability to pay a restitution fee. The court is not required to hold a separate hearing on the issue. [Pen C §1001.90\(d\)](#). The court may waive the fee if the court finds compelling and extraordinary reasons for doing so, and states them on the record. [Pen C §1001.90\(c\)](#).

The board of supervisors of any county may impose a fee at its discretion to cover the costs of collecting the mandatory restitution fee, not to exceed 10 percent of the amount imposed. [Pen C §1001.90\(g\)](#).

A diversion restitution fee may be enforced in the manner provided for the enforcement of money judgments generally. [Pen C §1214\(a\)](#). Any portion of the fee that remains unpaid after the defendant has completed diversion is enforceable by the California Victim Compensation and Government Claims Board. [Pen C §1214\(a\)](#).

J. Program Fees

1. [§62.50] Drug Treatment

The court may require a defendant to pay an administrative fee, as part of an enrollment fee in a drug treatment program, to cover the actual costs of (a) any criminalistics laboratory analysis, (b) processing the application for treatment, and (c) supervising the defendant. The payment may not exceed \$500 when the defendant is charged with a felony, or \$300 when the defendant is charged with a misdemeanor. [Pen C §§1001.15\(a\), 1001.16\(a\)](#).

2. [§62.51] Child Abuse and Neglect Counseling

A defendant referred to a counseling program under the provisions of [Pen C §1000.12](#) must pay the administrative cost of the referral, not exceeding \$100 dollars if the defendant is suspected of committing a felony or \$50 if the defendant is suspected of committing a misdemeanor. [Pen C §1000.17](#). In addition, the defendant is responsible for the expense of the counseling services, as determined by the social services or probation department. [Pen C §1000.17](#). The department must consider the defendant's ability to pay, and the defendant may not be denied

counseling services if he or she is unable to pay the costs. [Pen C §1000.17](#).

3. [§62.52] Other Misdemeanor Diversion Programs

Defendants diverted under any other pretrial misdemeanor programs (e.g., parental, cognitive developmental disability diversion) may be required to pay an administrative fee to cover the actual costs of processing the diversion application and supervising the defendant. [Pen C §1001.16\(a\), \(c\)](#). The payment may not exceed \$300. [Pen C §1001.16\(a\)](#). In addition, defendants may be required to pay all or a portion of the reasonable cost of diversion. [Pen C §§1001.53](#) (misdemeanor diversion), [1001.73](#) (parental diversion).

4. [§62.53] Defendant's Ability To Pay

The judge must take into consideration the defendant's ability to pay before ordering payment of administrative fees, and the judge may order all or partial payment as appropriate. If the defendant does not have the ability to pay the fees, he or she must nonetheless be allowed to participate in the diversion or deferred entry of judgment program. [Pen C §§1001.15\(a\), \(e\), 1001.16\(a\), \(e\)](#).

K. [§62.54] Timeliness of Diversion Request

Diversion must be requested before the commencement of trial. Once trial begins, it is too late to initiate diversion proceedings. *People v Wright* (1975) 47 CA3d 490, 493, 120 CR 899. It is irrelevant whether the defendant is acquitted of the charges that rendered the defendant initially ineligible for diversion. *People v Alonzo* (1989) 210 CA3d 466, 469, 258 CR 263. The diversion statutes do not indicate any specific point during the pretrial period beyond which the defendant cannot consent to or request diversion. Therefore, a defendant does not waive the right to consideration for diversion by making pretrial motions. *Morse v Municipal Court* (1974) 13 C3d 149, 157, 118 CR 14 (defendant entitled to diversion even though he did not consent until after [Pen C §1538.5](#) motion denied).

L. [§62.55] Diversion Request by Defendant

Although the diversion statutes imply that it is the prosecutor who initiates the inquiry into whether diversion is applicable to the defendant's case, in practice defendants routinely do so by serving the prosecutor with a notice of motion for an order granting diversion, accompanied by a

supporting declaration of eligibility. *People v Superior Court (On Tai Ho)* (1974) 11 C3d 59, 63 n4, 113 CR 21. In fact, a defendant who fails to initiate a diversion request may waive the right to consideration for diversion. In *People v Haycock* (1975) 45 CA3d 90, 119 CR 179, the court held that a defendant may not challenge, on appeal, the prosecutor's failure to conduct a diversion eligibility investigation when the defendant failed to make a timely request before the start of trial.

M. [§62.56] Defendant Charged With Multiple Offenses

A defendant charged with a divertible offense and a nondivertible offense that does not render the defendant ineligible for diversion may be granted diversion on the divertible offense before trial on the other offense. *Harvey v Superior Court* (1974) 43 CA3d 66, 117 CR 383; *People v Fulk* (1974) 39 CA3d 851, 855, 114 CR 567. Alternatively, the prosecutor may agree to dismiss the nondivertible charge on successful completion of diversion if the defendant is willing to waive time on the nondivertible offense. However, routine dismissal of nondivertible charges may not be an appropriate exercise of judicial discretion. See *People v Superior Court (Romero)* (1996) 13 C4th 497, 531, 53 CR2d 789 (abuse of discretion to dismiss case solely to accommodate judicial convenience or alleviate court congestion).

The court is faced with a practical dilemma not addressed by the diversion statutes when divertible and nondivertible charges are pending against the defendant. If convicted of the nondivertible charge(s) and imprisoned, the defendant will be physically incapable of participating in an education and counseling program. However, if the defendant is not convicted, or the charges are dismissed, the defendant could participate in a diversion program. The court in *Harvey v Superior Court*, *supra*, stated that the judge should consider the array of personal and social factors bearing on diversion and decide whether these factors justify immediate denial of diversion. If the factors make the defendant acceptable for diversion, the judge should then consider the concurrent criminal charges. If the judge determines that the probable outcome of those charges will militate against the defendant's availability and amenability to the diversion program, he or she may grant immediate diversion on the divertible charge. However, if the judge determines that the defendant's suitability and amenability for the diversion program heavily depends on the outcome of the concurrent charges, the judge may offer the defendant a deferment of the diversion application pending disposition of the other charges.

N. [§62.57] Conditioning Grant of Diversion or Deferred Entry of Judgment

The court may not condition a grant of diversion or deferred entry of judgment on any grounds other than those specified in the statutes outlining those programs. *Terry v Superior Court* (1999) 73 CA4th 661, 665, 86 CR2d 653. In *Terry*, the court held invalid a condition of deferred entry of judgment requiring the defendant to submit to random searches of his person and possessions for narcotics. Random search conditions were also held invalid under the former drug diversion scheme. *People v Fleming* (1994) 22 CA4th 1566, 1569, 28 CR2d 78; *Frederick v Justice Court* (1975) 47 CA3d 687, 121 CR 118. The court may not require a defendant to relinquish the right to make pretrial motions in order to obtain the benefits of diversion. *Morse v Municipal Court* (1974) 13 C3d 149, 158, 118 CR 14. In addition, a condition that defendant admit guilt to a divertible offense is invalid. *Parra v Municipal Court* (1978) 83 CA3d 690, 148 CR 203. However, a defendant's plea of guilty is a required condition of participation in a deferred entry of judgment program under Pen C §1000.1(b) (drug case).

IV. SCRIPTS

A. [§62.58] Ordering Probation Report; Setting Hearing

[The prosecutor states that he or she has reviewed the case file and advises the defendant and defense counsel that the defendant is eligible to participate in a diversion or deferred entry of judgment program.]

Note: In drug deferral of judgment cases, the prosecutor must provide written notification of deferred entry of judgment procedures to defendant and must file with the court a declaration, or state on the record, the grounds of eligibility or ineligibility. The prosecutor requests permission to have the matter referred to the probation department for a report.

[Mr./Ms.] [name of defendant], your attorney has told the court that you want your case referred to the probation department in order that a report may be prepared for possible [diversion of the criminal proceedings against you/grant of deferred entry of judgment]. Do you have any questions about the [diversion/deferred entry of judgment] program?

[Mr./Ms.] [name of defendant], do you consent to have your case referred to the probation department for preparation of a report?

*[If defendant responds "no," continue with normal proceedings.
If defendant responds "yes," continue.]*

[Mr./Ms.] [name of defendant], you are entitled to a speedy trial within [30 days of your arraignment or entry of plea/45 days of your arraignment or entry of plea/60 days after the finding of the indictment or filing of the information] unless you agree to a date beyond that time. Do you have any questions as to that right?

[Defendant responds:]

[Mr./Ms.] [name of defendant], in order for your case to be referred to the probation department, you must waive your right to a speedy trial. At this time, do you give up your right to a speedy trial?

[Mr./Ms.] [name of defense counsel], do you join in the speedy trial waiver?

[If defendant responds “no,” continue with normal proceedings.
If defendant responds “yes,” continue:]

[If felony case, add:]

[Mr./Ms.] [name of defendant], you are entitled to a preliminary hearing within ten court days of your [arraignment/entry of plea] unless you agree to a date beyond that date, and in no event may a preliminary hearing be set beyond 60 calendar days of your [arraignment/entry of plea] unless you agree to a later date. Do you have any questions as to that right?

[Defendant responds:]

[Mr./Ms.] [name of defendant], in order for your case to be referred to the probation department, you must waive your right to a speedy preliminary hearing. At this time, do you give up your right to a speedy preliminary hearing?

[Mr./Ms.] [name of defense counsel], do you join in the waiver of a speedy preliminary hearing?

[If defendant responds “no,” continue with normal proceedings.
If defendant responds “yes,” continue:]

The court finds that the defendant has expressly, knowingly, and intelligently waived [his/her] right(s) to a speedy trial [and a speedy preliminary hearing].

It appears to this court that the defendant is eligible to have [the criminal proceedings against [him/her] diverted/entry of judgment deferred]. This case, pursuant to Penal Code section ____, is hereby referred to the probation department for an investigation and report.

[Mr./Ms.] [name of defendant], I encourage you to cooperate with the probation department's investigation of your case. Any statements that you make to the department regarding the case and the offense for which you are charged may not be used against you in any subsequent court proceeding.

Do you have any questions about the probation department investigation?

[Defendant responds:]

A hearing on [diversion/deferred entry of judgment] will be held on [date].

[If defendant is charged with other counts, consider their disposition, e.g., whether time should be waived. If so, set them for later hearing, take time waiver, and determine bail or own-recognizance release on those counts.]

B. [§62.59] Deferred Entry of Judgment Hearing

Let the record reflect the presence of the defendant, who is represented by counsel, and the presence of the deputy district attorney.

I have received, read, and considered the probation report filed on [date], and consisting of ____ pages. I have also received, read, and considered [list all items considered].

[Mr./Ms.] [name of defense counsel], have you had an opportunity to read and consider the probation report? Would you like to be heard on the matter of whether the court should proceed with deferred entry of judgment of the defendant?

[Defense counsel responds:]

[Mr./Ms.] [name of district attorney], do you want to be heard?

[District attorney responds:]

[Alternative 1: If deferred entry of judgment denied:]

DENIAL OF DEFERRED ENTRY OF JUDGMENT

The court finds that [Mr./Ms.] [name of defendant] is [not suitable for/would not benefit from] the deferred entry of judgment program because [state reasons]. Accordingly, criminal proceedings will continue. The next hearing in this case is set for [date].

[Alternative 2: If deferred entry of judgment granted:]

GRANT OF DEFERRED ENTRY OF JUDGMENT

[Mr./Ms.] [name of district attorney], have you advised [Mr./Ms.] [name of defendant] in writing of the requirements of the deferred entry of judgment program and the consequences of failure to complete the program and of violation of any of its conditions?

[District attorney responds:]

[Mr./Ms.] [name of defendant], the court finds that you are suitable for the deferred entry of judgment program and would benefit by a program of [specify treatment program]. These findings are based on [state reasons].

[Mr./Ms.] [name of defendant], as part of your participation in the program you must agree to the following terms and conditions:

You must waive your right to a speedy trial [and preliminary hearing (felony case)], enter a plea of guilty to the charge(s), and waive time for sentencing.

You must comply with the program for a period of _____ [months/years]. [The program will conclude on _____ unless terminated earlier.]

You must enroll in a [describe program] and file proof of enrollment [in the clerk's office (and/or) with the probation department office that is supervising your case] not later than [date]. You must keep the probation department informed of your status in the program, including notifying the probation department if you do not attend program sessions.

You will be responsible to make payment of all or a portion of the costs of your program if the court [or the program] determines that you have the financial ability to pay those costs. In addition, the court will require payment of a restitution fee of \$_____ to the Restitution Fund.

If you fail to enroll in the program, or fail to perform satisfactorily in or benefit from the program, the court may, after a hearing, terminate the grant of deferred entry of judgment, enter judgment, and set a date for sentencing. This means that you would be sentenced based on your plea of guilty.

If you are convicted of a misdemeanor that reflects a tendency to violence or any felony, or engage in any criminal conduct that renders you unsuitable for deferred entry of judgment, the court may, after a hearing, terminate the grant of deferred entry of judgment, enter judgment, and set a date for sentencing.

If you satisfactorily complete the program, the criminal charge(s) that are subject to the deferred entry of judgment program will be dismissed, and your arrest for the charge(s) will be deemed to have never occurred. In addition, if you are asked any question concerning your prior criminal record, you may answer that you were not arrested or granted deferred entry of judgment for the offense(s). The record relating to your arrest and successful completion of the deferred entry of judgment program may not, without your consent, be used in any way to deny you any employment, benefit, license, or certificate. However, there are two exceptions. First, even if you successfully complete the program, if you apply for employment as a peace officer, you must disclose the arrest in response to any question in the employment application. Second, the arrest may be disclosed by the Department of Justice in response to any question on the application for employment as a peace officer.

If you are not a citizen of the United States, your plea of guilty may result in your deportation from the United States, exclusion from admission to the United States, or denial of naturalization as a United States citizen, even if you complete the deferred entry of judgment program.

Do you understand the requirements of the deferred entry of judgment program? Do you have any questions about the program?

[Defendant responds:]

[Mr./Ms.] [name of defendant], do you consent to participate in this program?

*[If defendant does not consent, resume the normal proceedings.
If the defendant does consent, continue:]*

[Mr./Ms.] [name of defendant], you are entitled to a speedy trial to be set within [30 days of your arraignment or entry of plea/45 days of your arraignment or entry of plea/60 days after the finding of the indictment or filing of the information] unless you agree to a date beyond that time. In order for you to participate in this program, you must waive your right to a speedy trial.

Do you have any questions about your right to a speedy trial? At this time, do you give up that right?

*[If defendant responds "no," continue with normal proceedings.
If defendant responds "yes," continue:]*

[If felony case, add:]

[Mr./Ms.] [name of defendant], you are entitled to a preliminary hearing within ten court days of your [arraignment/entry of plea] unless

you agree to a date beyond that date, and in no event may a preliminary hearing be set beyond 60 calendar days of your [arraignment/entry of plea] unless you agree to a later date. In order for you to participate in this program, you must waive your right to a speedy preliminary hearing.

Do you have any questions about your right to a speedy preliminary hearing? At this time, do you give up that right?

*[If defendant responds “no,” continue with normal proceedings.
If defendant responds “yes,” continue.]*

[Take defendant’s plea of guilty. Please refer to the script for taking a misdemeanor plea of guilty or no contest in California Judges Benchguide 52: Misdemeanor Arraignment (Cal CJER) and the script for taking a felony plea of guilty or no contest in California Judges Benchguide 91: Felony Arraignment and Pleas (Cal CJER).]

[Make findings on the plea.]

With respect to count ____ of the [complaint/information], the court finds that the defendant has expressly, knowingly, and intelligently waived [his/her] constitutional rights. The court finds that the defendant’s plea to count ____ is freely and voluntarily made with an understanding of the true consequences thereof and that there is a factual basis for the plea. It is ordered that the defendant’s plea of guilty and waiver of constitutional rights be accepted.

[Mr./Ms.] [name of defendant], you have a right to a sentencing hearing and to pronouncement of judgment within [six hours to five days (misdemeanor offense)/20 court days (felony offense)] of this date. Do you waive this right so that you can participate in the deferred entry of judgment program?

[Defendant responds:]

[Mr./Ms.] [name of defendant], you have the right to be sentenced by the judge who takes this plea. Do you waive that right also?

[Mr./Ms.] [name of defendant], do you have any further questions about the terms and conditions of the deferred entry of judgment program?

[Defendant responds:]

[Mr./Ms.] [name of defendant], you are ordered to obey those terms and conditions.

Pursuant to Penal Code section _____, the court defers the finding of guilty and entry of judgment on the plea.

[If applicable:]

It is ordered that the *[bond/undertaking/deposit]* on file or on behalf of the defendant be exonerated.

[Optional:]

It is ordered that, during the program period, the probation department file a report with this court relating to the defendant's compliance with the program every ____ months. A progress report hearing will be held on *[date]*. *[Mr./Ms.] [name of defendant]*, must be present on that date.

[If defendant is charged with other counts, address criminal proceedings and bail on those counts.]

C. [§62.60] Diversion Hearing

Let the record reflect the presence of the defendant, who is represented by counsel, and the presence of the deputy district attorney.

I have received, read, and considered the probation report filed on *[date]*, and consisting of ____ pages. I have also received, read, and considered *[list all items considered]*.

[Mr./Ms.] [name of defense counsel], have you had an opportunity to read and consider the probation report? Would you like to be heard on the matter of diversion of the criminal proceedings in this case?

[Defense counsel responds:]

[Mr./Ms.] [name of district attorney], do you want to be heard?

[District attorney responds:]

[Alternative 1: If diversion denied:]

DENIAL OF DIVERSION

The court finds that *[Mr./Ms.] [name of defendant]* is *[not suitable for/would not benefit from]* a diversion program because *[state reasons]*. Accordingly, criminal proceedings will continue. The next hearing in this case is set for *[date]*.

[*Alternative 2: If diversion granted:*]

GRANT OF DIVERSION

[*Mr./Ms.*] [*name of defendant*], the court finds that you are suitable for the diversion program and would benefit by a program of [*specify treatment program*]. These findings are based on [*state reasons*].

[*Mr./Ms.*] [*name of defendant*], as part of your participation in the program you must agree to the following terms and conditions:

You must waive your right to a speedy trial [*and preliminary hearing (felony case)*].

You must comply with the program for a period of ____ [*months/years*]. [*The program will conclude on ____ unless terminated earlier.*]

You must enroll in a [*describe program*] and file proof of enrollment [*in the clerk's office (and/or) with the probation department office that is supervising your case*] not later than _____. You must keep the probation department informed of your status in the program, including notifying the probation department if you do not attend program sessions.

You will be responsible for payment of all or a portion of the costs of your program if the court [*or the program*] determines that you have the financial ability to pay those costs. In addition, the court will require payment of a restitution fee of \$_____ to the Restitution Fund.

If you fail to enroll in the program, or fail to perform satisfactorily in or benefit from the program, the court may, after a hearing, terminate your diversion and resume the criminal proceedings against you.

If you are convicted of a crime during the diversion period, the court may, after a hearing, terminate your diversion and resume the criminal proceedings against you.

If you satisfactorily complete the program, the criminal charge(s) will be dismissed, and your arrest for the charge(s) will be deemed to have never occurred. In addition, if you are asked any question concerning your prior criminal record, you may answer that you were not arrested or granted deferred entry of judgment for the offense(s). The record relating to your arrest and successful completion of the deferred entry of judgment program may not, without your consent, be used in any way to deny you any employment, benefit, license, or certificate. However, there are two exceptions. First, even if you successfully complete the program, if you apply for employment as a peace officer, you must disclose the arrest in response to any question in the employment application. Second, the

arrest may be disclosed by the Department of Justice in response to any question on the application for employment as a peace officer.

Do you understand the requirements of the diversion program? Do you have any questions about the program?

[Defendant responds:]

[Mr./Ms.] [name of defendant], do you consent to participate in this program?

*[If defendant does not consent, resume the normal proceedings.
If the defendant does consent, continue:]*

[Mr./Ms.] [name of defendant], you are entitled to a speedy trial to be set within [30 days of your arraignment or entry of plea/45 days of your arraignment or entry of plea/60 days after the finding of the indictment or filing of the information] unless you agree to a date beyond that time. In order for you to participate in this program, you must waive your right to a speedy trial.

Do you have any questions about your right to a speedy trial? At this time, do you give up that right?

*[If defendant responds “no,” continue with normal proceedings.
If defendant responds “yes,” continue:]*

[If felony case, add:]

[Mr./Ms.] [name of defendant], you are entitled to a preliminary hearing within ten court days of your [arraignment/entry of plea] unless you agree to a date beyond that date, and in no event may a preliminary hearing be set beyond 60 calendar days of your [arraignment/entry of plea] unless you agree to a later date. In order for you to participate in this program, you must waive your right to a speedy preliminary hearing.

Do you have any questions about your right to a speedy preliminary hearing? At this time, do you give up that right?

*[If defendant responds “no,” continue with normal proceedings.
If defendant responds “yes,” continue:]*

[Mr./Ms.] [name of defendant], do you have any further questions about the terms and conditions of the diversion program?

[Defendant responds:]

[Mr./Ms.] [name of defendant], you are ordered to obey those terms and conditions. Pursuant to Penal Code section _____, the court suspends further proceedings in this case.

[If applicable, add:]

It is ordered that the [bond/undertaking/deposit] on file or on behalf of the defendant be exonerated.

[Optional:]

It is ordered that, during the period of diversion, the probation department file a report with this court relating the defendant's compliance with the program every _____ months. A progress report hearing will be held on [date]. [Mr./Ms.] [name of defendant] must be present on that date.

[If defendant is charged with other counts, address criminal proceedings and bail on those counts.]

V. [§62.61] ADDITIONAL REFERENCES

California Criminal Law Procedure and Practice, chap 27 (Cal CEB 2007)

4 Witkin & Epstein, California Criminal Law, *Pretrial Proceedings*, §§341–357 (3rd ed 2000)

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